Supreme Court, U.S.
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No. 94-432

In The

Supreme Court of the United States

October Term, 1994

H. SCOTT BUSCHMAN,

Petitioner,

v.

AIKEN & MAWICKE, S.C.
and MERRICK R. DOMNITZ,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Wisconsin

BRIEF IN OPPOSITION ON BEHALF OF AIKEN & MAWICKE, S.C. AND MERRICK R. DOMNITZ

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QUESTION PRESENTED

Whether this Court should overrule its recent decisions allowing parties to use subjective judgment on racially-neutral issues when exercising peremptory challenges.

PARTIES IN THIS PROCEEDING

The respondents filing this brief are Aiken & Mawicke, S.C. and Merrick R. Domnitz. Aiken & Mawicke, S.C. is a service corporation without any parent corporations or subsidiaries.

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JURISDICTION

Jurisdiction for this petition is found in 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the United States Constitution provides in relevant part that

No State shall . . . deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The petitioner, H. Scott Buschman, lost an arm when the crane he was operating tipped over in an industrial accident in December, 1984. He initiated a products liability lawsuit against the crane manufacturer and settled that action for $546,480. At the time of the settlement, he was represented by the respondents Aiken & Mawicke, S.C. and Merrick R. Domnitz.

Nearly two years after the settlement, the petitioner commenced a legal malpractice lawsuit against the respondents. He alleged that he had been coerced into accepting the settlement and that the respondents were guilty of other acts of malpractice.

Judge William D. Gardner of the Milwaukee County Circuit Court presided over the jury trial of this malpractice action. After attorneys for both sides had exercised their peremptory strikes, petitioner's counsel asked for the opportunity to make an objection out of the hearing of the jury. Whereupon proceedings took place in Judge Gardner's chambers following the three step process outlined in *Batson v. Kentucky*, 476 U.S. 79, 96-98 (1986). *See* (R.98: 109-116).

First, petitioner's attorney attempted to make a prima facie showing that defense counsel had exercised peremptory challenges on the basis of race. Specifically, it was asserted that there were four black persons on the jury and one Latino and that defense counsel had used

three of his four peremptory strikes to remove black jurors from the panel. Thereupon the trial court invited the defense counsel to explain why his peremptory strikes were used against black venirepersons.

Respondents' counsel described his reasons on the record for each of the three strikes against black venirepersons. (*Id.* at 114-116). As to one venireperson (Snipes), respondents' counsel observed that she "had a very difficult problem in dealing with fairly straightforward questions about what her relationship was with her counsel and how the fees were calculated; and I thought that considering this was going to be a products liability case married to a legal malpractice case, that it would be difficult for her, frankly, to keep up." Judge Gardner stated on the record that his own observations of this juror were consistent with those of respondents' counsel. (*Id.* at 114).

Respondents' counsel then stated that the voir dire had disclosed that a second black venireperson (Dorsey) was currently in a lawsuit in which she was unhappy with her attorney. Defense counsel had inquired of the entire panel whether anyone had ever had a dispute with their own attorney and it was clear from this venireperson's response that she was contemplating a claim against her counsel in a case that had not yet been resolved. Because the petitioner's lawsuit was a legal malpractice action, respondents' counsel felt that a person who was already contemplating an action against her own attorney was a clear candidate for a peremptory strike. (*Id.* at 115).

Finally, respondents' counsel told the court that his third peremptory strike of a black person was based on information developed during voir dire that this venireperson (Wattleton) had made the largest number of personal injury claims of any member of the panel. Petitioner's counsel confirmed on the record that this was an accurate count. Again, in light of the fact that the petitioner was pursuing a personal injury claim in the underlying products liability lawsuit, it was felt that this venireperson was a candidate for a peremptory strike. (*Id.* at 115-116).

Thereupon Judge Gardner concluded that the peremptory strikes "are not race based." (*Id.* at 116). This conclusion was based on Judge Gardner's: "own personal observations that the reasons provided by (respondents' counsel) for the exercise of his peremptories are reasonably based on the observations of the panel . . . " (*Id.* at 116).

The trial proceeded to a verdict exonerating the respondents and the petitioners appealed to the Wisconsin Court of Appeals. That Court issued its decision on April 5, 1994 deciding, inter alia, that the trial court's decision regarding the peremptory strikes was not clearly erroneous. The Wisconsin Supreme Court denied a petition for review on June 14, 1994 and the petitioner now requests the United States Supreme Court grant certiorari.

REASONS FOR DENYING THE PETITION

1. Trial lawyers may exercise peremptory strikes on the basis of their subjective judgment without offending the Equal Protection Clause.

The petitioner has not attempted to present the type of issue that normally serves to invoke a review on writ of certiorari under Rule 10. There is no suggestion that the decision of the Wisconsin Court of Appeals conflicts with any decision of this Court. Rather, the petitioner argues that the procedures this Court crafted in *Batson v. Kentucky*, 476 U.S. 79 (1986) and subsequent cases are inadequate to eliminate racial discrimination in the use of peremptory strikes, particularly insofar as strikes are based on "subjective" reasons.

This latter issue is different from the petitioner's expression of the "Question Presented" section of his brief. There he asks whether a presumption of racial discrimination should arise when more than one minority member of the venire is stricken. However, that issue was actually mooted below when the trial judge required the respondents to express the reasons for their strikes.

This Court should deny certiorari because it has endorsed reliance on subjective reasons in the exercise of peremptory strikes and because the record below demonstrates that the respondents had racially neutral reasons for their strikes.

In *Batson*, this Court held that the Equal Protection Clause in the Fourteenth Amendment governs the exercise of peremptory challenges by a prosecutor in a criminal trial. In a series of cases since *Batson*, the Court has

confirmed that, whether the trial is civil or criminal, prospective jurors and litigants have an equal protection right to jury selection procedures that are free of both racial and gender-based prejudice. *See Powers v. Ohio*, 499 U.S. 400 (1991); *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991); *Georgia v. McCollum*, 113 S. Ct. 1271 (1993); *J.E.B. v. Alabama*, 114 S. Ct. 1419 (1994).

The procedures and standards by which this promise is made reality have been defined by *Batson* and the cases that followed. First, the aggrieved litigant must make a prima facie showing that the opposition exercised its peremptory challenge(s) on the basis of race or gender. *Batson*, 476 U.S. at 96-97. If the requisite showing has been made, the burden shifts to the party exercising the strike to articulate a race or gender neutral explanation for striking the juror(s) in question. *Id.* at 97-98. Finally, the trial court must determine whether the aggrieved party has met its burden in proving purposeful discrimination. *Id.* at 98.

It is clear that the trial attorneys may rely on more than the jurors' verbal responses during voir dire. This Court has sustained strikes based on a variety of signals derived from body language and interpreted by counsel according to his/her "seat-of-the-pants" ideas about what these signals mean. In *Hernandez v. New York*, 500 U.S. 352 (1991) this Court dealt with just such judgments in a state criminal proceeding. The defense counsel objected that the prosecutor had used its peremptory challenges to exclude four potential jurors who were Latino. After it was determined that two of the jurors had been stricken for clearly valid reasons, the focus turned to the two jurors which the prosecutor had stricken because he

believed: "[T]here was a great deal of uncertainty as to whether [these jurors] could accept the interpreter as the final arbiter of what was said by each of the witnesses, especially where there were going to be Spanish-speaking witnesses. . . . " *Id.* at 356. The prosecutor explained that he doubted their commitment to accept the interpreter's translation when, after asking if they would accept the translation: "They each looked away from me and said with some hesitancy that they would try. . . . " *Id.*

The trial court accepted these reasons and denied the motion for mistrial. The New York Supreme Court, Appellate Division, and the New York Court of Appeals affirmed, each holding that the prosecutor had offered a legitimate basis for the challenges in question and deferring to the factual findings of the trial court.

This Court granted certiorari and, in accordance with *Batson*, afforded great deference to the trial court's decision that the prosecutor had exercised his peremptory strikes without an impermissible discriminatory intent, a finding to be sustained, absent a showing that it was "clearly erroneous." *Id.* at 369.

It is clear in *Hernandez* that the prosecutor relied on his own subjective interpretation of the jurors' nonverbal behavior when responding to his questioning. Specifically, he relied on his observations that they had looked away from him and answered with "some hesitancy" when he questioned them about their willingness to accept the translation of the court interpreter.

These are observations that are probably not verifiable from the transcript of the voir dire and they led to

judgments by the prosecutor that might be called "subjective." One could say that the prosecutor was acting on a "hunch" derived from a juror's "bare looks and gestures." *J.E.B.*, 114 S. Ct. at 1431 (O'Connor, J., concurring) (citing *Swain v. Alabama*, 380 U.S. 202, 220 (1965)). The exercise of the prosecutor's "subjective" judgment divided the potential jurors into two classes on either side on an important, racially-neutral issue: whether the jurors would accept the translation of the court interpreter. This Court recognized in *Hernandez* that, while such a judgment might create categories that included both Latinos and non-Latinos, it might also result in a disproportionate removal of the prospective Latino jurors. *Hernandez*, 500 U.S. at 361. Nevertheless, a racially disproportionate impact, standing alone, does not violate the Equal Protection Clause as a matter of law. *Id.*

The jury strikes at issue on this petition follow the same pattern reflected in *Hernandez*. Respondents' counsel had his personal, subjective reasons for striking each of the three jurors and those reasons were all racially neutral. A distinguishing feature of this case is that the reasons for striking each of the jurors are verifiable on the record.

2. The peremptory strikes of the three black jurors at issue in this petition were based on race-neutral reasons verifiable in the record.

Each of the three strikes was made for a different reason: juror Snipes because she appeared to have difficulty understanding and responding to the voir dire; juror Dorsey because she was in a lawsuit in which she

was unhappy with her attorney and contemplating a claim against him; and, juror Wattleton because he had made the largest number of personal injury claims of anyone on the panel.

The petitioner does not claim that any of these reasons is race-based. Instead, he argues that the record does not support the reasons given for striking jurors Snipes and Dorsey and that this Court should close an "escape hatch" that allows trial lawyers to justify their peremptory strikes with subjective reasons. In the latter regard, the petitioner asks the Court to establish a new rule requiring objective reasons "specifically supported by the record" to justify any peremptory strike of a minority where more than one such juror is stricken.

The record in this case discloses that each of the strikes is "specifically supported by the record." Unfortunately, it is the burden of the respondents to clarify the record and, in one instance, to correct a misstatement of the record made by the petitioner repeatedly in the appellate process of this case.[1]

First, respondents must clarify the record because petitioner omitted the trial judge's observation of juror Snipes. The respondents told Judge Gardner during the *Batson* hearing that they had stricken juror Snipes because she had difficulty dealing with the questioning during voir dire. The petitioner asserts that those reasons were

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[1] Petitioner's treatment of the record in his briefing before the appellate courts of Wisconsin has already drawn censure of his counsel. The Wisconsin Court of Appeals censured Attorney Sutton for a "false charge" in his brief before that court. *Pet. App. p. 8.*

not supported by the record of Ms. Snipe's responses on voir dire and then recites a portion of that voir dire (Petitioner's brief pp. 7-10.) However, petitioner fails to inform this Court that the record contains Judge Gardner's statement that his own observations were consistent with those of the respondents' counsel. (R.98: 114).

Next, respondents must correct a misstatement of the record regarding juror Dorsey. This again involves petitioner's omission of a critical exchange. Respondents' counsel told Judge Gardner during the *Batson* hearing that he had stricken juror Dorsey because voir dire had disclosed that she was contemplating a claim against her counsel on a case that had not been resolved yet. Petitioner informs this Court in his brief that: "In fact Ms. Dorsey said no such thing." Petitioner then recites portions of Ms. Dorsey's responses on voir dire. (Petitioner's brief pp. 11-13). Then petitioner again asserts that there is nothing in it that can be interpreted to mean that juror Dorsey was "contemplating a claim against her attorney." (Petitioner's brief p. 13).

For the second time in the appellate process of this case the petitioner has made a conscious, intentional misrepresentation of the record to the Court when reciting part of the exchange involving juror Dorsey. The petitioner has omitted an exchange that occurred during the voir dire of the entire panel by the respondents' counsel when the group was asked whether anyone had made a complaint against a lawyer.

> Mr. Scott: Has anyone made a claim against an attorney that is on this panel? Has anyone ever had a dispute with their

attorney over their fees? (R.98: 74; lines 13-15).

Following that question, respondents' counsel had an exchange with another juror. After that exchange was completed, the following question was again put to the entire panel:

Mr. Scott: Thank you. Anybody else have a complaint with an attorney?

Juror Dorsey: I will be if I don't get anymore money. (R.98: 75-76).

In the exchange that followed, Ms. Dorsey stated that she was unhappy with her attorney and she had told him she thought she was entitled to more money than he thought he could recover for her.

The petitioner made the same misrepresentation of the record in the Petition for Review submitted to the Wisconsin Supreme Court. (Petitioner's brief p. 11). The respondent was obliged to make the same correction in its response opposing the Petition for Review. (Respondents' brief p. 6).

The racially-neutral reasons for respondents strikes are fully supported by the record. While it is true that respondents' counsel made a "subjective" judgment about juror Snipes, it was a judgment about a race-neutral issue: her ability as a juror to understand and weigh testimony in a particularly difficult case. The trial would involve a "case within a case" in which jurors would hear testimony on both the products liability issues relating to the design of the crane and malpractice issues relating to

the conduct of the respondents. There would be conflicting expert testimony by both engineering and legal experts on issues that would be submitted to the jury.

The difficulty juror Snipes had with the voir dire was observable by both respondents' counsel and by the presiding trial judge. After the respondents had explained their strike of juror Snipes, the trial court commented on the record:

> THE COURT: I tried to help, in fact, in your voir dire Ms. Snipes by suggesting that she was misunderstanding what you meant by recovery. But I made observations consistent with what you said. (R.98: 114).

Hence, the strike of juror Snipes was "specifically supported by the record." When this Court has already confirmed that trial attorneys may use their "subjective" judgment to reach race-neutral reasons for exercising peremptory strikes, there would seem to be little room left for dispute when the trial judge confirms that he made the same observations and came to the same conclusions as respondents' counsel.

With jurors Dorsey and Wattleton, respondents' counsel again made the type of subjective judgments endorsed by this Court in *Hernandez*. Because he was defending a legal malpractice claim in which his client was alleged to have coerced the petitioner into accepting an allegedly inadequate settlement, respondents' counsel concluded that juror Dorsey (who was already upset with her attorney for suggesting a modest settlement of her personal injury claim) and juror Wattleton (who had made the largest number of personal injury claims of any

member of the panel) would be more sympathetic with the petitioner (a malpractice plaintiff) than with the defendant attorney accused of malpractice. Again, the judgments were made upon reasons that were "specifically supported by the record."

The transcript of the *Batson* hearing conducted by circuit judge William Gardner in this case reflects that the challenges to the jury strikes were handled fully and with dispatch. The three step process was followed and, after having heard all he needed from both attorneys, Judge Gardner made his findings that the reasons given by the respondents' counsel were "reasonably based on the observations of the panel . . . " and that they: "are not race based." (R.98: 116).

In summary, this case contains a record of how well a trial judge on the spot can deal with the *Batson* issues. There is nothing here that needs fixing.

CONCLUSION

The Court should dismiss the Petition for a Writ of Certiorari.

Respectfully submitted,

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